

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs July 25, 2001

STATE OF TENNESSEE v. JEFFERY H. PAYNE

Appeal from the Circuit Court for Bledsoe County
No. 63-1998 Buddy D. Perry, Judge

No. E2000-03028-CCA-R3-CD
October 11, 2001

The defendant, Jeffrey H. Payne, was indicted by the Bledsoe County Grand Jury for one count of rape of a child, one count of incest, five counts of aggravated sexual battery, and two counts of contributing to the delinquency of a minor. Pursuant to a negotiated plea agreement, Defendant pled guilty to two counts of attempted aggravated sexual battery, Tenn. Code Ann. § 39-13-504(a)(4), a Class C felony. Defendant also agreed to serve two consecutive four-year sentences as a Range I standard offender, with the manner of service to be determined by the trial court. Following a sentencing hearing, the trial court ordered that Defendant serve the effective eight-year sentence by incarceration. On appeal, Defendant contends that the trial court erred when it denied his request for probation or any other form of alternative sentencing. We affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed.

THOMAS T. WOODALL, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR. and ROBERT W. WEDEMEYER, JJ., joined.

Howard L. Upchurch, Pikeville, Tennessee, for the appellant, Jeffery H. Payne.

Paul G. Summers, Attorney General and Reporter; Patricia C. Kussmann, Assistant Attorney General; J. Michael Taylor, District Attorney General; and James W. Pope, III, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

The following facts which gave rise to Defendant's indictment are taken from the presentence report: on July 21, 1998, Vanessa Raulston, a case worker for the Tennessee Department of Children's Services, interviewed B.H., Defendant's thirteen-year-old stepdaughter and the victim in this case. (We shall herein refer to the victim by her initials.) B.H. informed Raulston that

Defendant had touched her several times on her breasts and vagina, gave her alcohol and marijuana on different occasions, and had sexual intercourse with her one time. On the same day, Defendant gave a written statement to Raulston wherein he admitted touching B.H.'s vagina "roughly 25 to 30 times over a four month period," but denied ever having sexual intercourse with her. Defendant's statement also acknowledged his awareness that the victim had been raped before. All instances of criminal conduct by Defendant allegedly occurred between October 1, 1997 and January 31, 1998, and B.H. was twelve years old at the time. Defendant pled guilty to two counts of attempted aggravated sexual battery, specifically, attempted unlawful sexual contact with a victim less than thirteen years of age.

At the sentencing hearing, Defendant testified that a 1996 accident left him disabled and unable to continue in his occupation as a truck driver because of permanent injury to his left leg. Shortly thereafter, he began taking prescription medications to relieve the pain and inflammation and grew marijuana for occasional use to help him sleep. According to Defendant, he also had a problem with alcohol, which he claimed was partially to blame for his criminal conduct toward B.H. He said that at the time of the offense, his mind was affected by alcohol and drugs—he was "dazed and confused" and "didn't really know who he was," which caused him to give his stepdaughter alcohol and marijuana and also engage in sexually inappropriate conduct with her. Defendant stated that "in a normal situation, me being straight and unimpaired [sic], I would never had [sic] done anything like that." Although he claimed that he had stopped taking pain medication, he continued the use of other medications, drank alcohol regularly, and smoked marijuana on occasion.

Defendant lived on the same property as his mother and testified that he served as her primary caretaker. Defendant's mother suffered from diabetes and orthopedic problems, and Defendant claimed that if he was incarcerated, no one else was available to perform this function. He testified that his mother depended on him to prepare her meals, watch her diet, administer her medicine, and drive her to the doctor and various other places. Defendant's older brother lived approximately one mile from their mother's house, but he had a family to take care of and a full time job which required him to be out of town on a regular basis. Therefore, he was not often available to help.

Defendant's mother also testified at the sentencing hearing and confirmed that Defendant occasionally assisted her in taking her medication, preparing her food, and in keeping up her home. She testified that she is required to see her doctor three or four times a year so that he may monitor her condition and that Defendant drives her to these appointments. When asked about Defendant's lifestyle, Mrs. Payne testified that Defendant is usually at home because he knows that she needs someone to help her in case of emergency. Defendant and his girlfriend lived together, rent-free, in a mobile home located on her property. Defendant had a part-time job, and his girlfriend had been unemployed since January 2000.

Defendant claimed to feel "terrible" about what he did to his stepdaughter and said that he wished it had never happened. Defendant testified that, if he were placed on probation or given another form of alternative sentencing, he would agree to attend counseling and a drug rehabilitation

program. He believed that counseling would be beneficial, but acknowledged that his previous attempt to complete a drug and alcohol rehabilitation program was unsuccessful. In fact, Defendant claimed that his consumption of alcohol has increased since he was arrested and admitted that he had never sought to reenter counseling or any type of treatment for sexual abuse. Defendant's mother confirmed that Defendant has been depressed and drinking excessively since he was charged with the offenses against his stepdaughter. She also stated that she would encourage Defendant to comply with any counseling or alternative sentence ordered by the court.

Lori Hartman, Defendant's girlfriend, lived with Defendant and testified that he assisted his mother on a daily basis. She also testified that Defendant expressed remorse for what he did to his stepdaughter. Hartman confirmed that, at the time of the sentencing hearing, Defendant drank often and used marijuana approximately once per week. She stated that the amount of alcohol Defendant drank depended on whether the Defendant was having a good day or a bad day, and he typically used marijuana for pain and to help him sleep. Hartman also testified that she would assist Defendant in complying with any alternative sentence or counseling program imposed by the trial court.

During the sentencing hearing, the trial court considered the presentence report, which contained statements from Defendant, the victim, and the victim's mother. The victim stated, inter alia, that since these offenses occurred, she has had difficulty sleeping and she repeatedly tried to hurt herself. She received counseling three times a week and took several medications, including prozac, addoral and valium. The statement from the victim's mother related tremendous concern for her child. She claimed that after the incident with Defendant, B.H. tried to kill herself many times. B.H. was then placed into a hospital and required medication to prevent her from harming herself further. In addition, B.H. was unable to behave normally in the presence of men. With men in the vicinity, B.H. panicked and cried uncontrollably. She would run off to hide, and they would discover her later, rocking back and forth in a fetal position.

At the conclusion of the sentencing hearing, the trial court ordered that Defendant serve his sentence in confinement. The record reveals that the trial court based its decision on the circumstances of the offense, the trauma to the victim, and the evidence of Defendant's continuing criminal activity. The trial court commented specifically that the facts that the offender was a stepparent, the criminal activity had been committed over a considerable period of time, and Defendant had knowledge that the victim had previously suffered the offense of rape, favored incarceration. In its summation, the trial court stated: "I've got the admission of an ongoing criminal activity during the time of the events. I've got admissions of continuing criminal activity now, and if I'm not going to send someone to the penitentiary on this set of facts, then I need probably to just surrender my position and walk away from it."

ANALYSIS

Defendant contends the trial court erred in denying him probation or some other form of alternative sentencing. Defendant argues that the State failed to successfully rebut the statutory presumption favoring alternative sentencing with evidence to the contrary as set forth in Tennessee

Code Annotated section 40-35-103(1). The State responds that the record fully supports the trial court's denial of any alternative sentencing. We agree with the State.

When a defendant challenges the length, range, or manner of service of a sentence, this Court conducts a de novo review of the record with a presumption that the determinations made by the sentencing court are correct. See Tenn. Code Ann. §§ 40-35-401(d), 40-35-402(d) (1997). If our review “reflects that the trial court followed the statutory sentencing procedure, imposed a lawful sentence after having given due consideration and proper weight to the factors and principles set out under the sentencing law, and that the trial court's findings are adequately supported by the record, then we may not modify the sentence even if we would have preferred a different result.” State v. Pike, 978 S.W.2d 904, 926-27 (Tenn. 1998); State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991). On the other hand, if the trial court failed to comply with the statutory guidelines, our review is de novo without a presumption of correctness. State v. Poole, 945 S.W.2d 93, 96 (Tenn. 1997). Having concluded that the trial court properly considered the sentencing principles and all relevant facts and circumstances in fashioning an appropriate sentencing alternative, our review of Defendant's sentencing determination in this case is de novo with a presumption of correctness.

In this case, the defendant has the burden of establishing that the sentence is improper. See Tenn. Code Ann. § 40-35-401(d), Sentencing Commission Comments. In determining whether the defendant has carried this burden, this Court must consider: (a) the evidence adduced at trial and the sentencing hearing; (b) the presentence report; (c) the principles of sentencing; (d) the arguments of counsel; (e) the nature and characteristics of the offense; and (f) the defendant's potential or lack of potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-103(5), -210(b) (1997).

Because Defendant is a standard Range I offender convicted of two Class C felonies, he is entitled to the statutory presumption in favor of alternative sentencing. See Tenn. Code Ann. § 40-35-102(6) (1997). However, “the determination of whether the [Defendant] is entitled to an alternative sentence and whether the [Defendant] is entitled to full probation are different inquiries.” State v. Boggs, 932 S.W.2d 467, 477 (Tenn. Crim. App. 1996). Where a defendant is entitled to the statutory presumption favoring alternative sentencing, the State has the burden of overcoming the presumption with evidence to the contrary. State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991); State v. Bingham, 910 S.W.2d 448, 455 (Tenn. Crim. App. 1995) overruled on other grounds; see Tenn. Code Ann. § 40-35-102(6), -103 (1997). “Conversely, the defendant has the burden of establishing suitability for total probation, even if the [defendant] is entitled to the statutory presumption of alternative sentencing.” Bingham, 910 S.W.2d at 455; see Tenn. Code Ann. § 40-35-303(b) (1997). Therefore, we shall address the issues concerning probation and alternative sentencing separately.

I. Probation

To meet the burden of establishing suitability for full probation, the defendant must demonstrate that probation will “subserve the ends of justice and the best interest of both the public and the defendant.” Bingham, 910 S.W.2d at 456 (quoting State v. Dykes, 803 S.W.2d 250, 259

(Tenn. Crim. App. 1990)). The following criteria, while not controlling the discretion of the sentencing court, shall be accorded weight when deciding the defendant's suitability for probation: (1) the nature and circumstances of the criminal conduct involved, Tenn. Code Ann. § 40-35-210(b)(4); (2) the defendant's potential or lack of potential for rehabilitation, including the risk that during the period of probation the defendant will commit another crime, see Tenn. Code Ann. § 40-35-103(5); (3) whether a sentence of full probation would unduly depreciate the seriousness of the offense, Tenn. Code Ann. § 40-35-103(1)(B); and (4) whether a sentence other than full probation would provide an effective deterrent to others likely to commit similar crimes, Tenn. Code Ann. § 40-35-103(1)(B). Id. Denial of full probation may be based solely upon the circumstances of the offense when they are of such a nature as to outweigh all other factors favoring probation. See State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

In determining whether to grant or deny full probation, additional considerations include the defendant's criminal record; social history and present condition of the defendant, including his or her mental and physical conditions where appropriate; defendant's amenability to correction and general attitude, including behavior since arrest, home environment, current drug usage, emotional stability, past employment, general reputation, marital stability, family responsibility, and the best interests of both the defendant and the public. See State v. Washington, 866 S.W.2d 950, 951 (Tenn. 1993); see also State v. Boyd, 925 S.W.2d 237, 244 (Tenn. Crim. App. 1995) (citing State v. Gennoe, 851 S.W.2d 833, 837 (Tenn. Crim. App. 1992)).

A defendant is eligible for full probation where the sentence received by the defendant is eight years or less, subject to some statutory exclusions not applicable here. See Tenn. Code Ann. § 40-35-303(a). Although full probation must be automatically considered by the trial court as a sentencing alternative whenever the defendant is eligible, "the defendant is not automatically entitled to probation as a matter of law." Tenn. Code Ann. § 40-35-303(b), Sentencing Commission Comments; State v. Hartley, 818 S.W.2d 370, 373 (Tenn. Crim. App. 1991). On appeal, a defendant seeking full probation usually bears the burden of showing that the sentence imposed is improper and that probation will be in the best interest of the defendant and the public. State v. Baker, 966 S.W.2d 429, 434 (Tenn. Crim. App. 1997).

Generally, this court will not set aside findings of fact made by the trial court after an evidentiary hearing unless the evidence contained in the record preponderates against the trial court's findings. State v. Dick, 872 S.W.2d 938, 943 (Tenn. Crim. App. 1993); State v. Young, 866 S.W.2d 194, 197 (Tenn. Crim. App. 1992). This deference applies to a trial court's findings of fact in the context of sentencing hearings. See State v. Raines, 882 S.W.2d 376, 383 (Tenn. Crim. App. 1994). Upon de novo review, we agree that the trial court's findings concerning the nature of the offense and Defendant's continuous criminal activity are sufficient to deny probation.

With regard to Defendant's criminal activity, we first observe that Defendant committed twenty-five to thirty acts of aggravated sexual battery against his stepdaughter over a four-month period. In addition, the record reveals that although Defendant admitted to having a problem with alcohol, he continued to drink alcohol and smoke marijuana even after he was arrested. We further

find the nature of the offense deplorable in that a father would give his stepdaughter, or any twelve-year-old girl for that matter, alcohol and marijuana. Defendant's actions showed excessive depravity in repeatedly sexually abusing his young stepdaughter, in spite of his awareness that she had previously been raped. Lastly, he evinced a complete disregard for the gravity of his wrongful conduct when he failed to seek help for the problem which he claims caused his appalling behavior in the first place. In spite of the severity of his offense, Defendant failed to seek any form of rehabilitation or treatment for his alcohol, drug, or sexual abuse problems. Consequently, we find incarceration for the full term of Defendant's sentence would not be inappropriate in this case.

In his brief, Defendant asserts that before a court may deny probation based upon the seriousness of the offense, the circumstances of the offense as committed must be especially horrifying, shocking, reprehensible, offensive or otherwise of an excessive or exaggerated degree, and the nature of the offense must outweigh all other factors favoring a sentence other than confinement. State v. Bingham, 910 S.W.2d 448, 454 (Tenn. Crim. App. 1995) (quoting State v. Hartley, 818 S.W.2d 370, 374-75 (Tenn. Crim. App. 1991)). Defendant is correct. However, the record contains ample evidence that Defendant's actions were sufficiently shocking, reprehensible, and offensive to deny full probation. In other words, a sentence of confinement to avoid depreciating the seriousness of the offense would be proper in this case. See Tenn. Code Ann. § 40-35-103(1)(B) (1997).

Moreover, we note that the potential for rehabilitation and its lack thereof is a proper consideration in determining whether confinement is appropriate. Tenn. Code Ann. § 40-35-103(5) (1997). This Court has previously held that a defendant's lack of candor, credibility, and willingness to accept responsibility for his crime are relevant considerations in determining a defendant's potential for rehabilitation. State v. Zeolia, 928 S.W.2d 457, 463 (Tenn. Crim. App. 1996); State v. Dowdy, 894 S.W.2d 301, 306 (Tenn. Crim. App. 1994); State v. Anderson, 857 S.W.2d 571, 574 (Tenn. Crim. App. 1992). Defendant's actions and testimony demonstrate a clear lack of potential in this regard. Although Defendant claimed to be sorry for his crime, he nevertheless proceeded to lay blame for his criminal conduct on his problems with alcohol and drugs. He refused to take responsibility even for those, claiming to need drugs for the pain in his leg and that the charges against him increased his need for alcohol. This apparent unwillingness to accept responsibility for his past and present criminal conduct further indicates that incarceration is appropriate. For the above reasons, Defendant has failed to show that the sentence imposed is improper or that probation will be in the best interest of the defendant and the public.

II. Alternative Sentencing Other Than Full Probation

The Appellant also argues that the trial court erred by not granting him a form of alternative sentencing other than probation. As a preliminary matter regarding alternative sentencing in general, we note that Defendant's convictions for attempted aggravated sexual battery, a "crime against the person," made him ineligible for alternative sentencing in the form of Community Corrections. See Tenn. Code Ann. § 40-36-106(a)(2). Neither does the record support Defendant's eligibility for the special needs provision in Tennessee Code Annotated section 40-36-106(c).

As a Range I standard offender convicted of Class C felonies, Defendant may be presumed a favorable candidate for alternative sentencing options in the absence of evidence to the contrary. Tenn. Code Ann. § 40-35-102(6) (1997). This presumption was acknowledged by the trial court in the case sub judice and may be rebutted by evidence that (1) “confinement is necessary to protect society by restraining the defendant who has a long history of criminal conduct,” (2) “confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses,” or (3) “measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant.” Id. § 40-35-103(1)(A)-(C); see Ashby, 823 S.W.2d at 169. In addition, a defendant’s potential for rehabilitation or lack thereof should be examined when determining whether an alternative sentence is appropriate. Tenn. Code Ann. § 40-35-103(5).

Upon de novo review, we first note that neither (1) nor (3) apply in this case. Although Defendant has a history of criminal conduct, it cannot be considered “long.” The presentence report shows only two misdemeanor convictions in 1994, one for resisting arrest and the other for possession of marijuana, and Defendant admitted to a third conviction (not in the record) of possession of drug paraphernalia in the year prior to October 2000. Nor have measures less restrictive than confinement frequently or recently been applied unsuccessfully to Defendant. Instead, we find the nature of Defendant’s conduct, for the reasons discussed supra in the context of determining the propriety of probation, is sufficiently shocking and reprehensible to also deny alternative sentencing. This conclusion is further supported by Defendant’s lack of potential for rehabilitation, also previously discussed, which is a proper consideration in determining whether sentence alternatives other than probation are appropriate. See Tenn. Code Ann. § 40-35-103(5) (1997).

In sum, we find that Defendant failed to carry his burden of showing that the sentence imposed is improper and that probation would be in the best interest of the Defendant and the public. We also conclude that the State successfully rebutted the statutory presumption favoring alternative sentencing under the circumstances of this case. Therefore, Defendant is not entitled to relief on this issue.

CONCLUSION

Accordingly, the judgment of the trial court is affirmed.

THOMAS T. WOODALL, JUDGE